

December 1, 2003

NOT FOR PUBLICATION
UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE TENTH CIRCUIT

**Barbara A.
Schmerhorn
Clerk**

IN RE JEFFREY DAVID RUSSELL and
SHELLY MARIE RUSSELL,

Debtors.

BAP No. WO-03-063

RONALD J. FANNING, individually, and
as successor in interest to PERRY
CHIROPRACTIC CLINIC, INC., and
KAREN FANNING,

Bankr. No. 97-22182-BH
Adv. No. 98-1120-BH
Chapter 7

Plaintiffs – Appellants,

v.

ORDER AND JUDGMENT*

JEFFREY DAVID RUSSELL,

Defendant – Appellee.

Appeal from the United States Bankruptcy Court
for the Western District of Oklahoma

Before CLARK, McNIFF, and THURMAN, Bankruptcy Judges.

PER CURIAM.

The parties did not request oral argument, and after examining the briefs and appellate record, the Court has determined unanimously that oral argument would not materially assist in the determination of this appeal.¹ The case is therefore ordered submitted without oral argument.

Ronald J. Fanning, individually and as successor in interest to Perry Chiropractic

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. 10th Cir. BAP L.R. 8018-6(a).

¹ Fed. R. Bankr. P. 8012.

Clinic, Inc., and Karen Fanning (collectively, the “Appellants”) timely appeal a final Order of the United States Bankruptcy Court for the Western District of Oklahoma denying their application seeking post-judgment relief to compel one of the debtors to appear and disclose assets.² Our jurisdiction is consented to because no party has elected to have the appeal heard by the United States District Court for the Western District of Oklahoma.³ For the reasons stated below, the bankruptcy court’s Order is REVERSED, and the case is REMANDED for further proceedings.

I. Background

In January 1996, Jeffrey David Russell (Jeffrey), one of the debtors, purchased certain assets related to a chiropractic practice from the Appellants pursuant to an Asset Purchase Agreement. To finance this purchase, Jeffrey executed a Promissory Note in favor of the Appellants in the principal sum of \$180,000, plus interest. The Promissory Note required Jeffrey to make monthly payments to the Appellants until 2006. Jeffrey also executed a Security Agreement, granting the Appellants a security interest in numerous assets.

In 1997, Jeffrey and his spouse filed a Chapter 7 petition. The Appellants are listed in the debtors’ Schedule D as creditors holding a secured unliquidated claim in the amount of \$242,412 (but, the debtors also state in Schedule D that the unsecured portion of the claim is in the same amount). At the time that the debtors filed their Chapter 7 case, Jeffrey and the Appellants were in disagreement about the Asset Purchase Agreement transaction. It is unclear whether a lawsuit related to the transaction had been commenced by any of the parties, but it is undisputed that a judgment related to the transaction had not been obtained by either party prior to the filing of the debtors’ Chapter 7 case.

The Appellants filed a proof of claim in the debtors’ case, asserting a secured

² 28 U.S.C. § 158(a)(1); Fed. R. Bankr. P. 8002(a).

³ 28 U.S.C. § 158(c); Fed. R. Bankr. P. 8001(e).

claim exceeding \$166,000. Although there is no accounting of how the claim was calculated, the attachments to the proof of claim show that the Appellants were seeking to recover against Jeffrey based on an alleged breach of the Asset Purchase Agreement, the Promissory Note and the Security Agreement.

In addition to filing their proof of claim, the Appellants commenced an adversary proceeding against Jeffrey, asserting that his discharge should be denied pursuant to 11 U.S.C. § 727(a)(2) and (a)(5)⁴ or, alternatively, that his debt to the Appellants should be excepted from discharge under § 523(a)(2)(A). The Appellants also sought attorney's fees and costs pursuant to the terms of their Security Agreement. The Appellants alleged, in relevant part, that Jeffrey had breached his obligations related to the Asset Purchase Agreement, and fraudulently transferred assets subject to their Security Agreement.

Jeffrey answered the Appellants' Complaint, denying the allegations therein and raising several affirmative defenses related to the validity of the Appellants' contract claims against him. For the most part, he claimed that he was fraudulently induced to enter into the Asset Purchase Agreement transaction.

The Appellants served certain discovery requests on Jeffrey, but he failed to respond. Accordingly, the Appellants filed a Motion to Compel and for Sanctions. In September 1998, the bankruptcy court entered a "Judgment Determining Debt to be Non-Dischargeable" (Judgment), granting the Appellants' Motion. In the Judgment, the bankruptcy court struck Jeffrey's pleadings, ruled that Jeffrey's debt to the Appellants was excepted from discharge under § 523(a), and awarded the Appellants a judgment in the amount of \$188,970.50, plus costs and attorney's fees.

Jeffrey requested that the bankruptcy court reconsider the Judgment. At the same time, the Appellants filed an Application seeking approval of their attorney's fees

⁴ Unless otherwise stated, all future statutory references are to title 11 of the United States Code.

and costs. Jeffrey objected to the Application. The bankruptcy court denied Jeffrey's request for reconsideration, and granted the Appellants' Application, awarding them \$11,400 in attorney's fees and costs (Fee Order).

The debtors received a discharge. Later, the Chapter 7 trustee filed a report of no distribution, and in May 2000, the debtors' case was closed.

In July 2003, the Appellants filed a notice in the bankruptcy court renewing the Judgment. Several days later, the Appellants filed their "Application of Judgment Creditor for Order Requiring Judgment Debtor to Appear and Disclose Assets" (Application to Compel). In the Application to Compel, the Appellants asserted that Jeffrey had not paid the entire Judgment. Thus, they requested that the court issue an order "directing him to appear . . . to answer concerning [his] property and that said Order should enjoin [Jeffrey] from alienating, concealing or encumbering any of his non-exempt property pending the hearing and further Order" ⁵ In their Brief in support of the Application to Compel, the Appellants explained that they were seeking relief pursuant to Federal Rule of Civil Procedure 69 and Federal Rule of Bankruptcy Procedure 7069. Jeffrey did not respond to the Application to Compel.

On July 31, 2003, the bankruptcy court entered an "Order Denying Plaintiffs' Application for Order Requiring Judgment Debtor to Appear and Disclose Assets" (Order), denying the Appellants' Application to Compel. In so doing, the court stated that, although not raised by any party, it had a duty to determine its jurisdiction. It concluded that it lacked subject matter jurisdiction to enter a money judgment, such as the Judgment and the Fee Order. The court concluded: "Since this Court never had subject-matter jurisdiction to enter the money judgment awarded to the Plaintiffs, it naturally follows that the Court is without power to enter any orders in aid of collection

⁵ Application to Compel at 1-2, *in* Appellant's Appendix at 34-35.

of the money judgment.”⁶

The Appellants appeal the Order. Jeffrey has not entered an appearance or filed any pleadings in the appeal.

II. Discussion

The Appellants raise one issue on appeal: “whether bankruptcy courts have subject-matter jurisdiction to enter monetary judgment in actions brought pursuant to 11 U.S.C. § 523, and orders in aid of collection of any such money judgments.”⁷ The bankruptcy court held that they do not. We disagree.

The issue raised in this appeal has been squarely decided by another panel of this Court. In Lang v. Lang (In re Lang) a majority of the panel concluded that “under the broad congressional grant of jurisdiction given to bankruptcy courts under 28 U.S.C. § 157, bankruptcy courts have the jurisdiction to award monetary judgments in a § 523(a) proceeding.”⁸ This panel is bound by the majority Opinion in Lang.⁹ Accordingly, based on Lang, the bankruptcy court erred in holding that it lacked subject matter jurisdiction, and its Order is reversed.

III. Conclusion

For the reasons stated herein, the bankruptcy court’s Order is REVERSED and the case is REMANDED for further proceedings.

⁶ Order at 3, *in* Appellants’ Appendix at 42.

⁷ Appellants’ Brief at 1.

⁸ 293 B.R. 501, 516-17 (10th Cir. BAP 2003).

⁹ *See, e.g., In re Blagg*, 223 B.R. 795, 804 (10th Cir. BAP 1998) (citing cases).